CHAPTER 4

SCOPE OF THE ACT

4.1 Much of the evidence the committee received suggested that a significant deficiency of the Act lies in its limited scope. A particularly strong theme was that the Act should provide broader protection from discrimination on the grounds of family responsibilities. Some organisations advocated the inclusion of additional grounds of discrimination. Others went further and suggested that the federal anti-discrimination acts should be replaced with a single national Equality Act.

Limited Scope of the Act

4.2 Several submissions suggested that the Act should contain a broader prohibition on discrimination rather than making discrimination unlawful in particular spheres of public life. For example, the Human Rights Law Centre, argued the effectiveness of the Act is undermined by it being limited to specified spheres of activity:

> The SDA prohibits narrowly defined acts of discrimination in specified fields of activity, namely: work; accommodation; education; the provision of goods, facilities and services; the disposal of land; the activities of clubs; and the administration of Commonwealth laws and programs. Discrimination which occurs outside these spheres, or which does not fall within the SDA's definition of direct or indirect discrimination, is not considered unlawful.
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> These limitations on the scope of the SDA restrict its effectiveness and are inconsistent with international human rights law.[1]

4.3 An officer of HREOC explained that:

> In relation to coverage, the way that the Act operates is that it does not just say it is unlawful to discriminate in anything. It says it is unlawful to discriminate in particular areas of public life. It puts out a bit of a patchwork of provisions to ensure that, in the relevant areas of public life such as employment, goods and services and education, there is no discrimination.[2]

4.4 HREOC pointed out that one practical consequence of this patchwork approach is that independent contractors and volunteers may not be protected from sex discrimination and sexual harassment by the Act because they may not be able to demonstrate that they fall within the provisions protecting employees:

> For example, in relation to volunteers, currently their protection is unclear because they need to be able to establish that they are an employee before

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1 *Submission 20*, p. 10. See also NACLC, *Submission 52*, p. 9; Law Council, *Submission 59*, p. 7.

2 *Committee Hansard*, 9 September 2008, pp 16-17. See also *Submission 69*, pp 110-112.

> they are able to be protected. ...If you are attending one afternoon a week at the school tuckshop to help out, you might have some difficulty in convincing a court that you fall within that classic employment relationship. We are saying that you should be entitled to protection under the SDA just as much as ...someone who is being paid.
>
> Likewise because independent contractors are not an employee, they can fall outside the provisions of the Act, even though, for example, if they are on a work site ...they might be subjected to discrimination or sexual harassment. Because they do not have that employment relationship, they might be left without a remedy...[3]

4.5 In addition, subsection 12(1) and section 13 limit the application of the Act in relation to state governments and state instrumentalities. HREOC noted that other federal discrimination legislation is not limited in this way:

> ...[T]here is an exclusion in relation to discrimination in employment and sexual harassment for state governments and state instrumentalities. That is something that is quite unique in the federal discrimination acts. None of the other federal discrimination acts have it. We are suggesting that that should be removed to give those employees protection equal to that of any other employee.[4]

4.6 Finally, while section 17 of the Act prohibits discrimination occurring in relation to partnerships, it only operates in relation to partnerships of 6 or more people. HREOC suggested this limitation was "both arbitrary and unnecessary"[5] and told the committee:

> Companies do not have any limitation. You can be a sole trader or a two-person company and you will still be covered. Likewise partnerships are covered in other aspects of the Act. This limitation of numbers applies in discrimination as to who is made a partner, or is refused benefits of a partner and that sort of thing. In our view it just no longer has relevance and should be removed.[6]

4.7 To provide a general remedy to the difficulties arising from gaps in coverage under the Act, the Human Rights Law Centre argued the Act should include a general prohibition on discrimination.[7] Ms Rachel Ball of the centre told the committee:

> The SDA should aim to eliminate all forms of discrimination. This requires that the scope of the Act be broadened. Currently the SDA is limited in the activities it covers and the types of conduct to which it applies. This limits

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3 *Committee Hansard*, 9 September 2008, p. 17. See also *Submission 69*, pp 117-120; Mr Ian Scott, Job Watch, *Committee Hansard*, 10 September 2008, p. 37.

4 *Committee Hansard*, 9 September 2008, p. 17. See also *Submission 69*, pp 113-116; Law Council, *Submission 59*, p. 16; Collaborative submission, *Submission 60*, p. 27.

5 *Submission 69*, p. 124.

6 *Committee Hansard*, 9 September 2008, p. 18. See also *Submission 69*, pp 123-124.

7 *Submission 20*, pp 10 and 14-15. See also NACLC, *Submission 52*, p. 9.

> the effectiveness of the Act and allows discrimination in Australia to go unidentified and unaddressed. ...Ways to remedy this problem would include introducing a general prohibition on discrimination as defined in article 1 of the Convention on the Elimination of All Forms of Discrimination against Women.[8]

4.8 HREOC more cautiously recommended that the merits of amending the Act to include a general prohibition against discrimination in all areas of public life should be considered.[9] HREOC suggested that this general prohibition would be equivalent to the free-standing prohibition against racial discrimination, in all areas of public life, under section 9 of the *Racial Discrimination Act 1975* and that the experience under the Racial Discrimination Act has shown that such provisions do not impose excessive burdens on the community.[10] HREOC also argued that:

> ...a blanket prohibition against discrimination in all areas of public life could represent an important statement of principle. It would make clear that discrimination offends against fundamental human rights in any area of public life and should not be tolerated. ...
>
> A blanket prohibition against discrimination in all areas of public life would also make the SDA clearer and simpler. It would minimise the need for complex litigation in interpreting the various provisions giving coverage to specific areas of public life. Rather, the general prohibition would operate largely as a 'catch-all' provision.[11]

4.9 HREOC further recommended that the merits of amending the Act to include an equality before the law provision, similar to section 10 of the Racial Discrimination Act, should be considered.[12] Section 10 of the Racial Discrimination Act provides that if persons of a particular race, colour or national or ethnic origin do not enjoy a right, or enjoy a right to a more limited extent, because of a law or a provision of a law, then, notwithstanding anything in that law, the right shall be enjoyed to the same extent.[13] HREOC noted that:

> ...the Preamble to the SDA affirms the right to equal protection and equal benefit of the law without discrimination on the ground of sex, marital status, pregnancy or potential pregnancy. However, the Preamble does not give rise to enforceable legal rights or obligations. It has no application to the discriminatory effects of statutory provisions. The current wording of the Preamble also fails to mention family and carer responsibilities.

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8 *Committee Hansard*, 10 September 2008, p. 2. See also Women Lawyers Association of New South Wales and Australian Women Lawyers, *Submission 29*, p. 6; Queensland Council of Unions, *Submission 46*, p. 5.

9 *Submission 69*, p. 113.

10 *Submission 69*, p. 112.

11 *Submission 69*, pp 112-113. See also pp 142-143.

12 *Submission 69*, p. 87. See also Human Rights Law Centre, *Submission 20*, pp 17-18.

13 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, para 3.19.

> In the interests of ensuring complete and faithful implementation of Australia's international human rights obligations, HREOC considers that the reference to equality before the law in the Preamble of the SDA is insufficient. Rather, it may be appropriate to include the right to equality before the law within the body of the SDA by inclusion of a similar provision to s 10 of the RDA.[14]

4.10 The Law Council made a similar proposal that the Act be amended to include a provision, similar to section 8 of the *Human Rights Act 2004 (ACT)*, providing that women and men are entitled to equality in law including equality before the law, equality under the law, equal protection of the law and equal enjoyment of human rights and fundamental freedoms.[15]

4.11 This inquiry is not the first to consider such proposals. The House of Representatives Committee recommended in the *Half Way to Equal* report that the Act be amended to include a general provision stating that discrimination on the basis of sex, marital status, potential pregnancy and family responsibilities is unlawful.[16] The committee noted that:

> The absence of a general prohibition in relation to discrimination against women in the SDA is in direct contrast to the Commonwealth legislation dealing with discrimination on the grounds of race. As discrimination against an individual on the basis of race or sex should be regarded as a contravention of a basic right, the Committee believes it is desirable to bring the Sex Discrimination Act in line with the general prohibition in the Racial Discrimination Act.[17]

4.12 ALRC made a similar recommendation, in Part 1 of the *Equality Before the Law* report, that the Act should contain a general prohibition on discrimination in accordance with article 1 of CEDAW.[18] However, ALRC warned that:

> ...the exemptions in the SDA would limit the effectiveness of a general prohibition of discrimination. Without their removal the prohibition would remain only of symbolic value.[19]

4.13 The House of Representatives Committee also recommended that a provision allowing for equal protection before the law similar to section 10 of the Racial

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14 *Submission 69*, p. 86. See also Collaborative submission, *Submission 60*, pp 27-28.

15 *Submission 59*, pp 7-8.

16 House of Representatives Committee, *Half Way to Equal*, pp xlvi- xlvii and 260. Note this recommendation was not supported in the dissenting report of Opposition members of the committee, pp 275-276.

17 House of Representatives Committee, *Half Way to Equal*, pp xlvi and 260.

18 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, recommendation 3.1.

19 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, para 3.16.

Discrimination Act be inserted in the Act.[20] ALRC supported inclusion of a provision in the Act modelled on section 10 of the Racial Discrimination Act, if exemptions in the Act were removed, particularly those relating to states and territories and acts done under statutory authority.[21] Indeed ALRC went further to argue that equality before the law is 'a limited notion' and that:

> There is a need for a guarantee of equality with a broader definition and a comprehensive operation unconstrained by the particular areas of application and range of exemptions of the SDA.[22]

Coverage of access to assisted reproductive technology, surrogacy and adoption

4.14 While many submissions supported broadening the scope of the Act, Family Voice Australia and the Australian Christian Lobby considered that its scope should be narrowed in relation to access to assisted reproductive technology (such as in vitro fertilisation (IVF)), adoption and surrogacy.[23] These organisations were concerned about the effect of the decision of the Federal Court in *McBain v State of Victoria (McBain)*.[24] The court in *McBain* held that provisions in the *Infertility Treatment Act 1995 (Vic)* which precluded the provision of fertility treatment to single women were inconsistent with the Act because those provisions discriminated on the basis of marital status. Under section 109 of the Constitution, the Victorian provisions were of no effect to the extent of that inconsistency. As a result, the fertility services had to be made available to women regardless of their marital status.[25]

4.15 Mr Benjamin Williams of the Australian Christian Lobby, told the committee:

> ...at this point in time, the SDA is blocking the states and territories from placing restrictions on access to IVF services. We think that is a completely illegitimate block and should be removed, thereby allowing the states themselves to decide on their own parameters for allowing access to IVF and other reproductive services.[26]

4.16 Mr James Wallace of the Australian Christian Lobby argued firstly, that the Act was not intended to have this effect and secondly, that its operation in relation to this issue was an illegitimate interference by the Commonwealth government in an

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20 House of Representatives Committee, *Half Way to Equal*, pp xlvi- xlvii and 260. Note this recommendation was not supported in the dissenting report of Opposition members of the committee, pp 275-276.

21 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, paras 3.19-3.21.

22 ALRC, *Equality Before the Law: Justice for Women*, ALRC 69 Part I, para 3.21.

23 Australian Christian Lobby, *Submission 71*, pp 1-2; Family Voice Australia, *Submission 73*, p. 2. See also Endeavour Forum, *Submission 36*, p. 1.

24 [2000] FCA 1009. See also *Re McBain* [2002] HCA 16.

25 Similar provisions in South Australian legislation were held to be inoperative by the Full Court of the South Australian Supreme Court. See Equal Opportunity Commission and the Office of Women (SA), *Submission 45*, p. 4; *Pearce v South Australian Health Commission* [1996] SASC 5801.

26 *Committee Hansard*, 11 September 2008, p. 56.

area that was properly the responsibility of the states and territories.[27] Finally, the Lobby submitted that:

> ...the rights of children are paramount in any discussion of reproductive technology. Evidence clearly supports the proposition that children do best when raised by both a mother and a father. Using the Sex Discrimination Act 1984 to challenge this fundamental principle is a social engineering experiment that deliberately fails to give children the most basic building blocks of development....
>
> By granting IVF access to single women and lesbians, the Sex Discrimination Act 1984 has been used as the route to subvert the natural consequences of lifestyle choices or circumstances. ...The problem of discrimination remains if the "right" of adults to have children are placed before the rights of children to have a mother and a father.[28]

4.17 The former Federal Government introduced the Sex Discrimination Amendment Bill (No.1) 2000 in the House Representatives in August 2000 and this committee reported on the provisions of the bill in February 2001.[29] This bill would have amended the Act to allow states and territories to restrict access to fertility services. However, the bill was not passed by the Parliament. The Australian Christian Lobby expressed general agreement with the bill but thought it may need to be broadened to cover alternative parenting arrangements such as adoption by homosexual couples.[30]

4.18 The Equal Opportunity Commission and the Office of Women (SA), considering this issue from a different perspective, suggested that discrimination relating to accessing fertility treatment is an emerging issue:

> In South Australia, there are an increasing number of enquiries from people who feel they are being treated unfairly because they are having treatment for fertility problems. This is an emerging issue as the average age of first time mothers increases. Unfair treatment because of fertility treatment or a lack of flexibility in the workplace to allow women to have treatment does not neatly fall within the matters covered by discrimination law. This is because the person is not disabled, nor is it necessarily discrimination on the grounds of pregnancy or potential pregnancy.[31]

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27 *Committee Hansard*, 11 September 2008, p. 51.

28 *Submission 71*, p. 2. See also *Committee Hansard*, 11 September 2008, p. 51; Family Voice Australia, *Submission 73*, pp 2-5.

29 Senate Legal and Constitutional Affairs Committee, *Inquiry into the Provisions of the Sex Discrimination Amendment Bill (No.1) 2000*, February 2001, at http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/1999-02/sexdisreport/report/contents.htm (accessed 8 October 2008).

30 *Committee Hansard*, 11 September 2008, pp 51-52.

31 *Submission 45*, p. 4.

Limited protection against discrimination on the grounds of family responsibilities

Incidence of discrimination

4.19 Several submissions provided evidence that discrimination on the grounds of family responsibilities remains prevalent. For example, Legal Aid Queensland stated that the majority of advice and representation they provide to clients relates to:

> ...discrimination on the grounds of pregnancy, family responsibilities or returning to work from maternity leave. We provide advice to women who have been discriminated against on this basis every week.[32]

4.20 Similarly, the Equal Opportunity Commission and the Office of Women (SA) advised the committee that:

> In 2007, the Commission received 35 enquiries where people felt they had been discriminated against because of their caring responsibilities. In the most serious examples, both women and men claimed that they had been fired for requesting flexible work arrangements to care for children with severe disabilities.[33]

4.21 However, Ms Annemarie Ashton of Carers Australia suggested that discrimination on the grounds of family responsibilities is more commonly indirect discrimination:

> ...evidence suggests to us that people are more likely to experience indirect discrimination from the effect of workplace policies and practices, such as being looked over for promotion or being ineligible for benefits or training due to having a status of part-time.[34]

4.22 Dads on the Air submitted that men face particular discrimination on the grounds of family responsibilities:

> Men are still expected to put in long hours and not take time off for family responsibilities. Women may sometimes find it hard to find an employer that gives them the job flexibility to enable them to care for their young children, but most men find it almost impossible.[35]

4.23 The Sex Discrimination Commissioner explained the importance of addressing discrimination on the grounds of family responsibilities:

> [T]here remain major barriers to supporting paid workers, both women and men, to balance their family and carer responsibilities with their paid working lives. Right now women continue to perform the bulk of unpaid

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32 *Submission 26,* p. 3.

33 *Submission 45*,p. 2.

34 *Committee Hansard*, 11 September 2008, pp 13-14.

35 *Submission 6,* p. 6. See also Ms Annemarie Ashton, Carers Australia, *Committee Hansard*, 11 September 2008, p. 16.

> work, yet enabling the equal sharing between women and men of responsibilities such as caring for our children, elderly parents and loved ones with a disability, is really at the heart of gender equality.
>
> This balancing of paid and unpaid work is a problem that must be solved, both for the health of our working population and for business and the strength of our economy, if we are to ensure a sustainable work force into the future.[36]

Broader protection against discrimination on the grounds of family responsibilities

4.24 The Act currently provides that it is unlawful for an employee to directly discriminate on the grounds of family responsibilities by dismissing an employee.[37] The Sex Discrimination Commissioner explained that:

> ...the Act is limited in terms of the protection from discrimination on the grounds of family responsibilities. It is limited in two ways: it talks only about direct discrimination, and we know that most discrimination that occurs in this area is the result of acts or requirements which, on their face, are neutral, because they equate everyone equally, but they have a disproportionate impact on people with family responsibilities. That is the first limitation...
>
> The second is that you can bring an action under the family responsibilities provision only if you are dismissed or sacked, rather than throughout the duration of your employment.[38]

4.25 The Sex Discrimination Commissioner further explained that, while women are sometimes able to pursue indirect sex discrimination claims, as an alternative to claims of discrimination on the grounds of family responsibilities, this option is not available to men:

> Women can get around that limitation because they can bring an indirect sex discrimination complaint. Judicial notice is taken of the fact that women have caring responsibilities for children—not so much that they have responsibilities for older people, but that they have caring responsibilities for children. No judicial notice is taken of men have caring responsibilities for young children. The limitations in the family responsibilities provision, as are currently set out, really have a greater negative impact on men than they do on women because women can bring the treatment under indirect sex discrimination.[39]

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36 *Committee Hansard*, 9 September 2008, p. 3. See also Ms Ashton, Carers Australia, *Committee Hansard*, 11 September 2008, pp 15-17; Dr Belinda Smith and Dr Joellen Riley, 'Family-friendly Work Practices and the Law', *Sydney Law Review*, Vol. 26 2004, pp 395-426.

37 Section 7A and subsection 14(3A) of the Act.

38 *Committee Hansard*, 9 September 2008, p. 16.

39 *Committee Hansard*, 9 September 2008, p. 16. See also Ms Shirley Southgate, NACLC, *Committee Hansard*, 9 September 2008, p. 33; Collaborative submission, *Submission 60*, p. 29.

4.26 The Law Council submitted that the limited operation of the family responsibilities ground of discrimination under the Act is "one of the most significant deficiencies of the legislation."[40] Furthermore, the Law Council argued that formulating claims of family responsibilities discrimination as indirect sex discrimination claims is problematic:

> Claims of indirect sex discrimination by reason of family responsibilities discrimination under section 5(2) of the SD Act necessarily require the court to make a finding, or accept on the basis of 'judicial notice', that women are the primary carers of infants and children.
>
> While this may historically have been accurate, and may remain the case for a large number of women, it perpetuates the stereotype that only or primarily women have or ought to have the care and responsibility for infants and children.[41]

4.27 Submissions to the committee overwhelmingly recommended that subsection 14(3A) of the Act should prohibit discrimination on the grounds of family responsibilities that falls short of dismissal. For example, the Equal Opportunity Commission and the Office of Women (SA) recommended strengthening the provisions under the Act to provide greater protection in circumstances:

> ...where the person is not sacked but is effectively demoted, demeaned or treated unfairly because of their caring responsibilities.[42]

4.28 HREOC similarly recommended amending the Act as soon as possible to ensure that all forms of discrimination on the grounds of family and carer responsibilities are unlawful. In particular, HREOC advocated amendments to:

> • make unlawful discriminatory treatment in all aspects of work, rather than restricting protection to discriminatory treatment in employment that results in dismissal.
>
> • make unlawful indirect family and carer responsibilities discrimination.[43]

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40 *Submission 59,* p. 24.

41 *Submission 59,* pp 24-25.

42 *Submission 45*,p. 2. See also Dads on the Air, *Submission 6,* pp 6-8; Women's Electoral Lobby, *Submission 8,* pp 12-14, Business and Professional Women Australia, *Submission 11,* p. 3, Dr Belinda Smith, *Submission 12,* p. 8; Non-Custodial Parents Party, *Submission 21,* p. 4; New South Wales Premier, *Submission* 23, p. 1, South Australian Premier's Council for Women, *Submission 18,* p. 2; Carers Australia, *Submission 33,* pp 12-13; NACLC, *Submission 52,* pp 10-11 and 17-18; Associate Professor Simon Rice, *Submission 53,* p. 6; ACTU, *Submission* 55, p. 7; YWCA, *Submission 58,* p. 9; Anti-Discrimination Commission Queensland *Submission 63,* pp 8-9; Families without Women, *Submission 67,* p. 34.

43 HREOC, *Submission 69,* p. 102. See also Dr Belinda Smith, *Committee Hansard*, 9 September 2008, p. 59; Collaborative submission, *Submission 60,* p. 14.

4.29 The Anti-Discrimination Commissioner of Tasmania went further and recommended extending protection from discrimination on this ground beyond employment to areas such as the provision of services and rental accommodation.[44]

4.30 Ms Ashton of Carers Australia argued that a further reason the Act does not provide adequate protection from discrimination to carers is the narrow definition of 'family responsibilities' in section 4A:

> There are several key shortfalls in the current Sex Discrimination Act that do not take into account the totality of caring relationships. Caring relationships cannot depend upon narrow definitions of 'near relative'. ... More than ever, we find people in the community who do not have any family at all around them and they rely on the support of close friends or neighbours for care when they need it.
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> ...Carers Australia contends that it is the provision of care that matters, not the type of relationship in which that care takes place.[45]

4.31 The Women Lawyers Association of New South Wales and Australian Women Lawyers (Australian Women Lawyers) also supported expanding protection under the Act by replacing references in the Act to 'family responsibilities' with 'responsibilities as a carer' and including other relationships, particularly step relatives, within the definition of 'immediate family' in subsection 4A(2).[46]

4.32 There was not however universal support for expanding the scope of the family responsibilities provisions in the Act. The Australian Chamber of Commerce and Industry (ACCI) noted that the family responsibility provisions in the Act are not the only protection available to employees. ACCI submitted that state and territory anti-discrimination legislation, the *Workplace Relations Act 1996* and entitlements employees have through workplace agreements all play a role in assisting employees to balance work and family responsibilities.[47] Furthermore, in light of the protection against discrimination on the basis of family responsibilities available under other legislation, ACCI argued that it is erroneous to suggest that there is a 'regulatory gap' in relation to the protection available to men against discrimination on the basis of their family responsibilities.[48]

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44 *Submission 13*, p. 4. See also Associate Professor Simon Rice, *Submission 53*, p. 6.

45 *Committee Hansard*, 11 September 2008, pp 13-14.

46 *Submission 29*, pp 7-9. See also Carers Australia, *Submission 33*, p. 10; Independent Education Union of Australia, *Submission 49*, p. 5; NACLC, *Submission 52*, pp 17-18; ACTU, *Submission 55*, p. 8.

47 *Submission 25*, pp 19-20. For example, paragraph 659(2)(f) of the *Workplace Relations Act* prohibits termination of employment on the basis of an employee's family responsibilities.

48 *Submission 25*, pp 20-21.

Positive duty to accommodate family and carer responsibilities

4.33 In addition to strengthening the prohibition against discrimination on the grounds of family responsibilities, HREOC considered that the Act should impose a positive duty on employers, partnerships and principals to reasonably accommodate the needs of their workers in relation to pregnancy, and family and carer responsibilities. This duty would include an obligation not to 'unreasonably refuse' requests for flexible work arrangements.[49] HREOC argued that the imposition of a positive obligation on employers would involve "a subtle re-positioning of the SDA, rather than a dramatic change" because the prohibition on indirect discrimination already prohibits "the unreasonable imposition of barriers that disadvantage, for example, women with family responsibilities."[50] Nevertheless, HREOC submitted the change would be an important one:

> Firstly, the current obligation is merely implied and may not be immediately apparent to employers and others unless they or their advisers have considerable experience in the operation of the SDA. By making the obligation clear and mandatory, respondents are therefore on clear notice of what they are required to do, rather than having to fathom their obligations from the case law.
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> Secondly, repositioning the obligation as a positive duty is an important statement of principle that employers must actually take steps to redress discrimination. It is a clear call to action, rather than a muffled warning that doing nothing carries a liability risk.[51]

4.34 In a similar vein, Ms Ashton of Carers Australia argued that:

> ...reformed legislation should include a positive duty upon employers to accommodate fair requests for flexible work arrangements from employees with family and care responsibilities. Anti-discrimination legislation alone has traditionally resulted in little in the way of wide scale reform. A requirement to accommodate will have a much more substantive effect for workers.[52]

4.35 Unions New South Wales also supported a legislative requirement to provide flexible working arrangements that balance work with caring responsibilities.[53]

4.36 The Victorian Attorney-General outlined recent amendments to the *Equal Opportunity Act 1995 (Vic)* which provide greater protection against discrimination on

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49 HREOC, *Submission 69*, pp 104-109. See also Community and Public Sector Union - State Public Services Federation, *Submission 24*, p. 3; Human Rights and Equal Opportunity Commission, *It's About Time: Women, men, work and family,* Sydney, March 2007, pp 60-65.

50 *Submission 69*, p. 107.

51 *Submission 69*, p. 108.

52 *Committee Hansard*, 11 September 2008, p. 14. See also Collaborative submission, *Submission 60*, p. 15.

53 *Submission 5*, p. 3. See also Anti-Discrimination Commission Queensland, *Submission 63*, pp 8-9 and 14.

the grounds of parental or carer responsibilities in relation to employment and employment related areas.[54] The Attorney-General explained that as a result of these amendments:

> ...an employer, a principal or a firm may not unreasonably refuse to accommodate the parental or carer responsibilities of a person offered employment, an employee, a contract worker, a person invited to be a partner in a firm or a partner in a firm. In determining whether the refusal to accommodate the worker's family responsibilities was unreasonable, all relevant facts and circumstances must be considered, including the needs of the employer's business.[55]

4.37 HREOC has previously recommended introduction of a separate Family Responsibilities and Carers' Rights Act which would incorporate a positive duty on employers to reasonably consider requests for flexible work arrangements to accommodate family and carer responsibilities.[56] Carers Australia supported this approach.[57] Ms Ashton told the committee:

> Carers Australia supports the Human Rights and Equal Opportunity Commission's proposal for a separate specialised family responsibilities and carers' rights act. This act will better enable the recognition of carer responsibilities. It will provide coverage against discriminatory practices in areas within and beyond the workplace.[58]

4.38 In addition to its proposals for immediate amendments to the Act, HREOC suggested that longer term options for reform would be either to insert family and carer responsibilities as a distinct protected ground under a federal Equality Act, or to give consideration to enacting a specialised piece of legislation, such as a separate Family Responsibilities and Carers' Rights Act.[59]

4.39 ACCI did not support amendment of the Act to impose a positive duty on employers to accommodate family and carer responsibilities. ACCI pointed to the proposed National Employment Standards (NES) to be introduced in 2010 which will include a right for employees to request flexible working arrangements and extensions to parental leave.[60] ACCI submitted that there should not be:

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54 *Submission 43*, p. 2. See also NACLC, *Submission 52*, p. 18; Victorian Equal Opportunity and Human Rights Commission, *Submission 72*, p. 2.

55 *Submission 43*, p. 2.

56 HREOC, *It's About Time: Women, men, work and family*, Sydney, March 2007, recommendations 4 and 6, pp 59 and 64.

57 *Submission 33*, pp 5, 11-12 and 13-14. See also Associate Professor Simon Rice, *Submission 53*, p. 5; HREOC, *Submission 69*, p.103.

58 *Committee Hansard*, 11 September 2008, p. 14.

59 *Submission 69*, pp 103-104.

60 *Submission 25*, p. 21. See also Minister for Employment and Workplace Relations, *The National Employment Standards*, at: http://www.workplace.gov.au/NR/rdonlyres/1955FD28-3178-44CD-9654-56A3D5391989/0/NationalDiscussionPaper_web.pdf (accessed 14 October 2008), pp 12 and 21-22.

> ...any further extension of employee rights in this area, before employers have had an opportunity to understand and manage the additional employee rights that will flow from the introduction of the NES.[61]

4.40 Mr Scott Barklamb of ACCI also expressed concern about how the new obligations under the NES and the Victorian *Equal Opportunity Act 1995* would interact:

> The problem potentially for people in Victoria is that you are going to have a new obligation in the national employment standards and you are going to have this new extra anti-discrimination obligation in Victoria. ...[T]he changes to the Victorian Equal Opportunity Act are potentially in some collision with this new national employment standard. [62]

4.41 By contrast, HREOC submitted that:

> Whilst the new National Employment Standard is a positive development, it is insufficient to address the needs of workers with family responsibilities in a number of respects. In particular, the right to request is confined to children under school age, does not apply to workers unless they have at least 12 months continuous service and also, in the case of casual workers, a reasonable expectation of continuing employment.[63]

Discrimination on the basis of sexual orientation, gender identity, breastfeeding and other grounds

4.42 A number of submissions proposed including additional grounds of discrimination within the Act. The Equal Opportunity Commission and the Office of Women (SA) argued that there should be a comprehensive remedy for discrimination on the grounds of sexual orientation under Commonwealth legislation rather than the current limited protection under sections 31 and 32 of the HREOC Act.[64]

4.43 Sections 31 and 32 of the HREOC Act confer on HREOC a power to inquire into practices which may constitute discrimination and report to the Attorney-General in relation to those inquiries. However, the Attorney-General's Department advised that, while sexuality and gender identity are grounds of discrimination in all state and territory jurisdictions, these are not grounds of discrimination under Commonwealth law.[65]

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61 *Submission 25*, p. 21.

62 *Committee Hansard*, September 2008, p. 21.

63 *Submission 69*, p. 105.

64 *Submission 45*, p. 4. See also NACLC, *Submission 52*, p. 20; Victorian Equal Opportunity and Human Rights Commission, *Submission 72*, pp 2-3; HREOC, *Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the ground of sexual preference*, HRC Report No. 6, 1998 available at: http://www.humanrights.gov.au/pdf/human_rights/discrimination_sexual_pref.pdf (accessed 2 September 2008).

65 *Answers to question on notice*, 22 October 2008, p. 3.

4.44 The Castan Centre for Human Rights Law recommended amending the Act to create specific protection for the rights of transsexual, transgender and intersex people.[66] The centre outlined the variable protection of transsexual, transgender and intersex people from discrimination, available under state and territory legislation, and advocated the Commonwealth providing consistent and comprehensive legislative protection from discrimination for these groups.[67]

4.45 The Australian Coalition for Equality supported providing comprehensive protection against discrimination on the grounds of sexual orientation and gender identity under Commonwealth law but suggested there were drawbacks to including sexuality and gender identity as additional grounds under the Act. In particular, the coalition argued, firstly that the provisions of the Act are dated and not designed to handle this type of discrimination, and secondly that an amendment to the Act would not send out a clear message that discrimination on the grounds of sexual orientation or gender identity is, in and of itself, unacceptable behaviour. Instead, the coalition supported enactment of specific legislation dealing with sexuality and gender identity discrimination.[68]

4.46 The Androgen Insensitivity Syndrome Support Group Australia submitted that people born with intersex conditions continue to face discrimination particularly in relation to their right to marry and protection from irreversible, non-therapeutic medical intervention without court authority.[69] The group did not advocate a specific legislative solution to these issues but sought the elimination of this discrimination.[70]

4.47 Whilst not opposing the inclusion of additional grounds of discrimination under the Act, Christian Schools Australia told the committee that if the scope of the Act was expanded to include additional grounds they may seek a corresponding expansion of the exemption in section 38. Section 38 allows educational institutions established for religious purposes to discriminate for some purposes in the areas of employment and education. The Chief Executive Officer Mr Stephen O'Doherty explained further:

> If the Act started to redefine sex to include chosen gender, as some acts have, that is clearly a matter on which churches have taken a view. That becomes a very important matter in schools employing persons who will be able not only to adhere intellectually but also live by the teachings of the religion in relation to sexuality.
>
> ...If you refresh the language in legislative terms to start using the word 'gender' instead of 'sex', or if you started to include the language of 'chosen gender', that would raise specific flags for Christian schools and other Christian organisations, which I think we would then be asking you to

66 *Submission 51,* p. 10.

67 *Submission 51,* pp 16-24. See also NACLC, *Submission 52,* p. 21.

68 *Submission 80,* p. 3.

69 *Submission 1*, pp 2-5.

70 *Submission 1*, p. 5.

> address separately, or at least ensure that our ability to discriminate included the ability to discriminate on issues such as chosen gender.[71]

4.48 The Queensland Council of Unions recommended amending the Act to include several additional grounds of discrimination. In addition to sexuality and gender identity, the council suggested discrimination on the grounds of lawful sexual activity as a sex worker, parental and relationship status (as distinct from marital status) and breastfeeding should be unlawful.[72]

4.49 HREOC also recommended inclusion of breastfeeding as a separate protected ground under the Act. The Act currently provides that breastfeeding is a characteristic that appertains generally to women and it is therefore intended that discrimination on this basis will be captured under the definition of direct sex discrimination.[73] However the Act does not make breastfeeding a separate ground of discrimination in its own right. The Sex Discrimination Commissioner explained:

> The way the SDA is currently drafted, it would seem that the intent is that breastfeeding discrimination is already covered. It is just that it is in a more indirect way that you get there. What we are suggesting is that it should just be put up front and made clear that breastfeeding is a protected attribute.[74]

Addressing intersecting forms of discrimination

4.50 The committee received evidence that existing federal anti-discrimination legislation, including the Act, has a limited capacity to address discrimination on intersecting grounds, such as sex and race, or sex, disability and age. NACLC explained that the experience of intersecting forms of discrimination, or discrimination on multiple grounds, is not merely the sum of its parts:

> An analogy that has often been used to explain this intersectionality is that of a cake. Each of its constituent elements – flour, sugar, eggs, milk, cocoa and so on – are fundamentally different from the eventual combined product of a chocolate cake. Further, the individual ingredients can no longer be separated out and identified. The cake is not merely the accumulation of various ingredients. It is an entirely new entity. Similarly the experience of discrimination where the victim is an African Muslim woman is fundamentally different from that of an Anglo-Saxon woman or an African man. The discrimination experienced is not merely sex discrimination plus race discrimination plus religious discrimination. It is a new and unique experience of discrimination based on the intersection of her multiple identities.[75]

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71 *Committee Hansard*, 9 September 2008, p. 56.

72 *Submission 46,* p. 2.

73 Subsection 5(1A) of the Act.

74 *Committee Hansard*, 9 September 2008, p. 12. See also *Submission 69*, pp 89-90; Anti-Discrimination Commission Queensland, *Submission 63*, p. 9.

75 *Submission 52,* pp 19-20. See also Ms Caroline Lambert, *Committee Hansard,* 11 September 2008, p. 58.

4.51 The National Foundation for Australian Women submitted that the Act needs to provide better protection against discrimination based on gender and other grounds. The Foundation noted that there is no capacity for the court to look at the whole act of discrimination where the discrimination occurs for a range of reasons.[76] Ms Shirley Southgate of NACLC discussed this issue in the context of complaints by women from non-English speaking backgrounds:

> The experience of discrimination for a woman from a non-English speaking background is a separate and unique experience to that of an English speaking woman. There is no capacity within the legislation to say, 'This is a whole unique experience.'
>
> You might be able to say, 'I have a complaint under the Race Discrimination Act, and I have a complaint under the Sex Discrimination Act', but you cannot say, 'As they intersect it becomes a different experience.' There is no capacity for the courts to take that into account.[77]

4.52 Associate Professor Beth Gaze also identified this as shortcoming of the Act:

> The case law indicates that claims by women in these categories (who could be regarded as affected by multiple discrimination grounds, or 'intersectionality') are rarely litigated. It is very difficult to work out what these women would have to prove to establish their claims if the claim involves combined ground discrimination.[78]

4.53 The Law Council explained that these difficulties arise from the structure of federal anti-discrimination legislation:

> Because federal anti-discrimination legislation addresses discrimination by way of four separate pieces of legislation, plus the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*, each law is designed to address discrimination on the basis of only one type of difference or characteristic (or attribute appertaining to that characteristic).
>
> The SD Act is for example formulated to address only discrimination on the basis of sex, marital status, pregnancy, potential pregnancy, family responsibilities and sexual harassment. It is not capable of taking into account any variation of the experience of only sex discrimination, such as discrimination on the grounds of both sex and race or sex and disability.[79]

4.54 The Anti-Discrimination Commission Queensland noted that the ALRC *Equality Before the Law* report identified these difficulties and recommended

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76 *Submission 15,* p. 8. See also Law Council, *Submission 59*, p.30; Anti-Discrimination Commission Queensland, *Submission 63*, pp 11-12.

77 *Committee Hansard*, 9 September 2008, p. 32.

78 *Submission 50*, p. 2. See also Collaborative submission, *Submission 60*, p. 15.

79 *Submission 59*, p. 30.

amending Commonwealth discrimination legislation to enable HREOC to deal with complaints that fall across different discrimination legislation.[80]

4.55 The Law Council more specifically recommended amending either subsection 46PO(4) of the HREOC Act, or each federal anti-discrimination Act[81] so that:

> ...in cases where complainants allege discrimination on multiple grounds, such as on the grounds of both race and sex, or on the grounds of both disability and sex, the 'multiple discriminations' can be appropriately addressed. Such legislative amendment ought to include guidance to the court to take into account the experience of multiple differences in awarding remedies.[82]

4.56 The Human Rights Law Centre similarly supported amending the Act to require HREOC or the court to consider joining related complaints made on the grounds of discrimination covered by separate federal anti-discrimination legislation.[83]

An Equality Act?

4.57 Some submissions argued that the whole structure of federal anti-discrimination legislation needs to be changed to effectively address discrimination on intersecting grounds. For example, Australian Women Lawyers submitted that replacing the existing separate pieces of federal anti-discrimination legislation with a single Equality Act would be a more effective mechanism for dealing with intersecting forms of discrimination.[84]

4.58 NACLC advocated enacting a single national Equality Act for broader reasons:

> Under the current pieces of Commonwealth anti-discrimination legislation, limited grounds of protection from discrimination are provided. In order to provide broader protection and freedom from discrimination, and implement Australia's international treaty obligations ...it is submitted that a single Equality Act would be a preferable legislative mechanism. Clearly, a single Act would provide a means of harmonising the processes for

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80 *Submission 63*, pp 11-12. See ALRC, *Equality Before the Law: Justice for Women,* ALRC 69 Part I, recommendation 3.9.

81 That is the Act, the *Racial Discrimination Act 1975*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*.

82 *Submission 59,* pp 30-31.

83 *Submission 20,* pp 5 and 26-27.

84 *Submission 29,* pp 5-6 and 17. See also Ms Shirley Southgate, NACLC, *Committee Hansard*, 9 September 2008, p. 32; Women's Legal Services Australia, *Submission 44*, p. 2; ACTU, *Submission 55*, p. 11.

> promoting equality, addressing systemic discrimination and inequality, and dealing with individual complaints.[85]

4.59 In addition, Ms Eastman of the Law Council identified practical benefits which would flow from replacing the existing anti-discrimination acts with an Equality Act:

> I think from a practical perspective—and I speak from a practitioner's perspective—to have all of the relevant anti-discrimination provisions in one act at a federal level would certainly make the process much easier for applicants, respondents and practitioners because there is not a consistency in the terms of all of the federal acts, which is race, age, sex and disability, although each of those areas have their own special considerations. But there is certainly a real benefit in having some clear national standards.[86]

4.60 However Professor Margaret Thornton cautioned that a difficulty with the Equality Act model is that it treats all forms of discrimination as the same:

> One of the problems with a so-called omnibus act having a whole range of grounds within the legislation—sex, race, sexuality, age, disability and so on—is that they end up being treated as mirror images of the other. That, I think, can have a distorting effect. We see this happen with state acts, which do follow the omnibus model. I suppose it is both a strength and a weakness of the federal legislation that it has adopted a different model of having the discreet pieces of legislation so that one is not necessarily seen as a mirror image of the other...[87]

4.61 ALRC considered the merits of an Equality Act in detail as part of its inquiry into equality before the law. HREOC noted that, in the *Equality Before the Law* report, ALRC recommended enactment of an Equality Act to guarantee men and women equality before the law, with the ultimate aim of entrenching a constitutional guarantee of equality.[88] However, the ALRC proposal was for legislation to complement rather than replace existing anti-discrimination legislation.[89]

4.62 HREOC suggested that the merits of introducing a comprehensive Equality Act for Australia should be examined by a separate inquiry.[90] The Sex Discrimination Commissioner explained the rationale for this approach:

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85 *Submission 52*, p. 39. See also Ms Caroline Lambert, YWCA Australia, *Committee Hansard*, 11 September 2008, p. 59.

86 *Committee Hansard*, 10 September 2008, p. 53. See also Mr Ian Scott, JobWatch, *Committee Hansard*, 10 September 2008, p. 43.

87 *Committee Hansard*, 11 September 2008, p. 44. See also Miss Elnaz Nikibin, UNIFEM Australia, *Committee Hansard*, 9 September 2008, p.42.

88 *Submission 69*, pp 259-260; ALRC, *Equality Before the Law: Women's Equality*, ALRC 69 Part II, recommendations 4.1 to 4.8.

89 ALRC, *Equality Before the Law: Women's Equality*, ALRC 69 Part II, para 4.46.

90 *Submission 69*, pp 259-267.

> An equality act would involve incorporating the Sex Discrimination Act with other federal discrimination laws, such as the Disability Discrimination Act, into one piece of legislation. This would be a major reform, so it needs adequate time to be investigated. We therefore propose that this committee support a national inquiry into the merits of adopting an equality act. That would deliver a considered view on whether having a single federal equality act is indeed preferable to the current situation of separate federal acts.[91]

4.63 HREOC recommended more generally that a two stage process be adopted to reform of the Act. The first stage would involve improving institutional arrangements and immediate amendments to strengthen the Act. The second stage would involve a national inquiry to look at issues which will require further consultation.[92] The Sex Discrimination Commissioner elaborated:

> ...we are recommending a two-stage process of national reform to the Sex Discrimination Act to be completed over three years. There are changes to the Sex Discrimination Act that can be made now to significantly strengthen the effectiveness of the law. To that extent, we make 54 recommendations for immediate implementation, and that is our stage one. However, we consider that some of the reforms to the Act require a more extended period of consultation to achieve the right outcome.[93]

4.64 Several witnesses expressed support for a two stage approach to reforming the Act. For example, Ms Eastman of the Law Council:

> [I]n general we would be supportive of a two-stage process if the first stage was to look at issues that could be the subject of immediate amendment and immediate application in terms of the operation of the Act.[94]

4.65 Dr Belinda Smith noted that such an approach would allow Australia to thoroughly consider the innovative approaches to addressing inequality adopted in other countries:

> I support the HREOC proposal that this be a two-stage inquiry and that there are things that could and should be done immediately. But there are a lot of things that I think we could learn from these other countries that have developed other regulatory frameworks and have had them in place long enough to see some of the results. But we need to do research and we need to have public debate to think about how they might work in Australia.[95]

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91 *Committee Hansard*, 9 September 2008, p. 3. See also Collaborative submission, *Submission 60*, pp 37-39; *Submission 69*, p. 260.

92 *Submission 69*, pp 8-13.

93 *Committee Hansard*, 9 September 2008, p. 3.

94 *Committee Hansard*, 10 September 2008, p. 51. See also Ms Shirley Southgate, NACLC, *Committee Hansard*, 9 September 2008, p. 30; Ms Rosalind Strong and Miss Elnaz Nikibin, UNIFEM Australia, *Committee Hansard*, 9 September 2008, pp 41-42; Dr Marie Joyce, Ordination of Catholic Women, *Committee Hansard*, 11 September 2008, p. 29.

95 *Committee Hansard*, 9 September 2008, p. 59.